In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
THE COMMONWEALTH TITLE, INSURANCE and Trust Company, trustee. } No. 172.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment rendered by the Court of Claims on the following facts:

On May 9, 1890, Amanda Cormack entered or purchased 160 acres of land at the land office at Helena, Mont., same being called entry No. 4096, for the north one-half of the northeast quarter, section 28, and the east one-half of southeast quarter, section 21, township 20 north, range 5 east. On the next day said Amanda Cormack borrowed the sum of $300 from the Northwestern Guarantee Loan Company, for the payment of

which she gave a mortgage under the laws of Montana on the above-described land. On June 9, 1890, the Northwestern Guarantee Loan Company assigned, for value, the above-described mortgage to the present claimant, the Commonwealth Title Insurance and Trust Company.

On August 16, 1894, 120 acres of the above-described entry was cancelled by the General Land Office for conflict with the Box Elder reservoir system, and the purchase of the remaining 40 acres was confirmed. In February, 1896, the claimant below, the appellees here, commenced a suit in the State court of Montana to foreclose the above-described mortgage, and pursuant to this suit the land was ordered to be sold to satisfy the mortgage, at which sale the appellee became the purchaser on August 16, 1897. Thereafter the appellee applied to the Commissioner of the General Land Office for the repayment of $150, under the provisions of section 2 of the act of June 16, 1880 (21 Stat. L., 287), for the repayment of $150, being the purchase price of the 120 acres which were cancelled for conflict. The Commissioner of the Geneaal Land Office disallowed the claim upon the ground that the appellee was not an assignee of the original entryman, but on appeal to the Secretary of the Interior that officer reversed this decision and allowed the claim. The claim was then sent to the Treasury Department for final settlement, and the Auditor of the Treasury for the Interior Department favorably

passed upon the claim, but his decision was overruled and the claim disallowed by the Comptroller. Thereupon suit was instituted in the Court of Claims for the recovery of the said $150 and judgment rendered in favor of the claimant, from which the United States have appealed to this court.

SPECIFICATIONS OF ERROR.

The court erred:

1. In holding that the appellee was the assignee of Amanda Cormack, within the meaning of that expression as used in section 2 of the act of June 16, 1880.

2. In rendering judgment in favor of the appellees and in declining to dismiss the petition.

BRIEF.

I.

The facts found by the court below do not support the judgment rendered.

The findings of fact by the Court of Claims are a special verdict and determine all matters of fact like the verdict of a jury (*United States* v. *Smith*, 94 U. S., 214; *Stone* v. *United States*, 164 U. S., 380), and, like every other special verdict, they must contain of and in themselves, without the slightest reference to the testimony, or by any process of piecing together, every essential fact necessary for the resultant judgment. The special verdict is one by which the facts are found and

the law is submitted to the judges. A special verdict, in order to sustain the judgment, must pass upon all the material issues made in the pleading, so as to enable a court to say, upon the pleadings and verdict, without looking at the evidence, which party is entitled to a judgment. (*Ward* v. *Cochran*, 150 U. S., 507, 608; *Prentiss* v. *Zane's Administrator*, 8 How., 370, 483; *Hodges* v. *Easton*, 106 U. S., 408; *Stone* v. *United States*, 164 U. S., 380; *Newbegin* v. *The National Bank*, 26 U. S. App., 712.)

In *Stone* v. *United States* (164 U. S., 380) it was held that the findings of the Court of Claims in an action at law determine all matters of fact, like the verdict of a jury; and when the finding does not disclose the testimony, but only describes its character, and without questioning its competency simply declares its insufficiency, this court is not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings.

The statute which is the foundation of the present action (act of June 16, 1880, § 2, 21 Stats. L., 287) reads:

> In all cases where homestead or timber-culture or desert-land entry or other entry of public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry,

> or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same, *upon the surrender of the duplicate receipt* and the execution of a proper relinquishment of all claims to such lands whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

It will be seen that the surrender of the duplicate receipt is, by the statute, made an essential prerequisite of the repayment of the purchase money, and as was said by this court in the case of *Hoffeld* v. *United States* (186 U. S., 273, at p. 278), "the requirement that the receipt shall be surrendered is as peremptory as the requirement that the person demanding the payment shall be an heir or assign of the original entryman."

Turning now to the findings of fact (Transcript, pp. 16 and 17), it is disclosed that the court has nowhere found that the duplicate receipts were ever in the possession of the appellee or ever surrendered by it, as required by the statute. It is therefore submitted that the findings do not support the judgment of the court.

II.

This mortgagee is not an assignee of the original entryman and is not entitled to the repayment of this purchase money under the provisions of the act of June 16, 1880.

The land in question being situated in the State of Montana, the mortgage given upon it is to be construed and dealt with in accordance with the

laws of that State on that subject, which are as follows (Montana Annotated Civil Code, vol. 1, sec. 3810 et seq.):

> SEC. 3810. Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession.
>
> SEC. 3812. The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.
>
> SEC. 3813. Any transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual possession, in which case it is deemed a pledge.
>
> SEC. 3815. A mortgage is a lien upon anything that would pass by a grant of the property.
>
> SEC. 3817. A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect.

Thus it is seen that under the laws of this State a mortgage is the hypothecation of property and its inseparable incidents, creating no personal obligation whatever and extending to no personal rights unless expressly contracted for in the instrument, as to which in the case at bar there is neither allegation, proof, nor finding. The inquiry, therefore, is whether the right of repay-

ment secured to the original entryman under the act of June 16, 1880, is to be regarded as an inseparable incident of the land itself in the nature of a covenant that flows with the land, or is to be regarded as a personal right in the original entryman or such person as he himself voluntarily and personally designates to receive its benefits.

This inquiry, it seems to us, has already been answered by this court in *Hoffeld* v. *United States* (186 U. S., 273). In that case Mr. Justice Brown delivered the opinion of the court, and in discussing this very question said (pp. 277–279):

> The case of the *City of Norwich* (118 U. S., 468), though arising under the maritime law, is pertinent in this connection. This was a petition under the limited liability act, Revised Statutes, section 4285, which declares that if the owner of a vessel elect to take the benefit of the act, it shall be a sufficient compliance with the law "if he shall transfer his interest in said vessel and freight, for the benefit of the claimants, to a trustee," who becomes in reality an assignee for the benefit of creditors under the act. It was held that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and that whatever the extent or character of his ownership might be, the amount or value of that interest was to be the measure of his liability. It was also held that his transfer of such interest under the law did not operate as

> an assignment of his insurance upon the vessel, which was a collateral contract, personal to the insured, but not conferring upon him any interest in the property; in other words, the contract of insurance does not attach itself to the thing insured or go with it when it is transferred.

Applying the principle of this case to the provisions of section 2 of the act of June 16, 1880, the court concluded as follows:

> One who seeks to take advantage of it must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself but to everything which the statute has annexed thereto as an incident. The right to a return of the purchase money is in no sense an incident to the land, and did not pass to the purchaser upon the sale under the execution.

The learned court below seemed to think this language of the decision in the Hoffeld case had no application to the case at bar, because in the Hoffeld case the applicant for repayment was one who had taken the property upon the sale under execution, and the right did not attach until the execution sale, at which time the entry had already been canceled, whereas in the case of a mortgagee his interest attached at the date of the mortgage and prior to the time at which the entry had been canceled. In the first place this reasoning has no force because under the statute itself no right to repayment ever arises until the entry

has been duly canceled by the Commissioner of the General Land Office, so that at the date of the mortgage the entry not yet having been canceled, there was nothing which the mortgagee could take. But the complete answer to this argument is that it begs the question. If the right of repayment under this statute is an incident of the land and goes with the land wherever the land goes, then it remains attached to the land until it is discharged by actual payment, and anyone legally acquiring the land would likewise legally acquire this inseparable incident of the land, and hence if at the date of the execution sale the entry had been canceled and repayment had not been made, and the right of repayment was an incident of the land itself, the party acquiring the title to the land under the execution sale would acquire the right of repayment, and, indeed, there would be nothing else to acquire; and in this respect there is no sort of difference between a purchaser at the judicial sale and the purchaser at the mortgage foreclosure sale.

But the court below also seems to think that by the act of giving the mortgage Amanda Cormack voluntarily assigned to the mortgagee the right of repayment; but this likewise depends entirely upon whether the right of repayment is an incident of the land or is a personal right. If the right of repayment is an inseparable incident of the land and goes wherever the land goes, then, of course, she assigned that right at the time she

made the mortgage, for the law of Montana expressly provides (Civil Code, 3817): "A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect." And, again, in section 3812 it is provided that the lien of a mortgage is special, unless otherwise expressly agreed. On the other hand, if it is a personal right which does not flow with the land, then, equally, of course, she did not assign the right at the time she made the mortgage. Now, it is not alleged or found that at the execution of this mortgage the mortgagor bound herself by any personal obligation to mortgage anything more than the land itself and its inseparable incidents. She did not part with any personal right or incur any personal obligation. It is not alleged or found that Amanda Cormack ever made any actual assignment of right of repayment created by this statute, or that she ever surrendered to the mortgagee the duplicate receipts.

The right of repayment under this statute is a personal right accruing to the entryman at the date of cancellation of the entry and passes to him only unless he personally voluntarily designates some one else to receive it. As was said by this court in the Hoffeld case: "It is in *no sense* an incident to the land." It does not pass by implication of law to an execution purchaser, to a mortgagee, or even to a vendee, unless by the contract of purchase or mortgage it is expressly made one

of the muniments of title, nor is it a claim against the United States under the provisions of section 3477, Revised Statutes, which nullifies and avoids the transfer or assignment of all claims against the United States. The right to the repayment of purchase money upon the cancellation of an entry is not a claim, but a debt expressly created by statute and expressly authorized by the statute which does create it to be assigned or transferred to some one else. A consideration for the purchase money having failed by reason of the cancellation of the entry, the law directs the return of the money to the person who made the entry, to his heirs, if dead, or to his assigns, if living. It is entirely personal with the entryman, and the law has not undertaken to adjudicate any rights between the entryman and his creditors. If the mortgagee desires to lend money upon the security of so imperfect a title as one which rests only upon the final receipts and before the issue of a patent, knowing full well that such title is subject to defeasance at any time prior to the issuance of a patent, it is his own lookout if he does not provide himself with sufficient security for the payment of his loan. And to this end it is also his own lookout if he does not in the instrument of mortgage, or otherwise by contract, take an additional voluntary assignment of the right of payment in case of cancellation, as well as a mortgage upon the land itself unless otherwise satisfied with the financial ability of the

mortgagor to pay the debt at maturity. The law does not concern itself in personal transactions of entrymen, nor does it undertake to discharge the debts of the entryman. It only undertakes to return to the entryman the money which is justly his due, because of the cancellation of the entry, leaving his personal obligations to other people to take care of themselves. There might very well be cases in which there would be quite a number of transfers by sale, mortgage, or otherwise, of property of this character prior to the cancellation of the entry. The statute does not cast upon the General Land Office the obligation of searching the title to this land through its various alienations to determine the present legal owner. The law does not recognize such persons at all, unless they have become the actual, personal, voluntary assignees of the original entryman, and in order to prove that they must show an instrument of assignment and accompany it with a surrender of the duplicate receipts.

It is submitted that the judgment of the court below is erroneous, and that the same should be reversed.

LOUIS A. PRADT,
Assistant Attorney-General.

GEORGE HINES GORMAN,
Special Attorney.